

IP Frontiers: Reimagining the future of New York's courts



By **DAVID MIRANDA**
Daily Record
Columnist

This column typically discusses legal topics related to technology, but this month we look at how technology relates to the law, specifically our court system. In the midst of a pandemic, our world in lockdown, lawyers are learning to navigate the challenges of working remotely.

These circumstances provided the Chief Judge of the State of New York, the Hon. Janet DiFiore, with the opportunity to “reimagine the future of New York Courts.” In June 2020 Chief Judge DiFiore formed a commission to assess the use of technology in our court system, and to set a course for the future using lessons learned during this pandemic. The commission is comprised of a distinguished group of judges, lawyers, academics and technology experts, and is chaired by Hank Greenberg, of Greenberg Traurig, and past president of the New York State Bar Association.

Like all of us, our court system has been forced to expedite and expand the use of technology in order to continue to conduct essential operations during this pandemic. The commission takes a step back to analyze what’s working, what needs improvement, and makes recommendations for our post-pandemic future. The commission’s initial report in November, the first of several, addresses the efficacy of virtual court proceedings, and proposes an online dispute resolution pilot project, a centralized website portal for consolidating various New York “eCourts” systems; and instituting

mandatory e-filing in all the state’s trial courts. The November 2020 Report of the Commission can be found at: <http://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf>.

Recognizing the disjointed and decentralized nature of New York’s Unified Court System (UCS), the Commission recommends that the UCS website be redesigned and centralized to facilitate comprehensive and coordinated use for litigants, attorneys and the courts. Currently, only a handful of our state’s courts require mandatory electronic filing of court papers via New York’s e-filing system.

The commission recommends that e-filing become standardized and mandatory across all New York trial courts and integrated into the UCS website portal. Understanding that large and historically underserved segments of the public may not have access to computers, software, and other technology necessary for e-filing, the commission recommends that kiosks be housed at community centers where users can access the online court and e-filing systems. The commission, assessing how courts have adapted to challenges posed by the pandemic, emphasizes the increased need for our court system to consider and expand the use of virtual proceedings. Although virtual court proceedings present significant efficiencies and opportunities, they also present new challenges to attorney-client confidentiality and access to counsel. The commission recognizes that virtual proceedings give lawyers and courts the opportunity to better serve a broader group of people. Without needing to travel to and from court, or waiting several hours in court for a proceeding, costs of litigation will

be reduced, lawyers may be able to address a greater number of clients in need, and our courts will be able to better ration its in-person resources. Virtual proceedings also make it easier for a court to hear from witnesses or advocates who would otherwise be unavailable due to physical distance or lack of time, such as social workers, parole officers or medical professionals.

One of the chief challenges to remote proceedings is the ability of clients to meaningfully interact with their remote counsel. This concern is particularly challenging in criminal proceedings, since incarcerated persons don’t have the privacy required to speak confidentially with their counsel. In addition, sensitive matters like domestic violence and child abuse may not be properly addressed in settings away from the courthouse. The commission recommends that virtual proceedings be prioritized for use in proceedings where the benefits are likely to be greatest, and the costs and risks are likely to be the lowest. Certain proceedings, such as an initial conference, or other procedural hearings, may be more compatible to virtual presentations, than other proceedings such as those involving witness testimony or the presentation of complex evidence. In order to have a consistent platform for remote proceedings, virtual court appearances in New York require use of Microsoft Teams software.

The commission also recommends a pilot project to use and study online dispute resolution (ODR) for the purpose of resolving litigation via out of court settlement of disputes through technology. Currently, at least 18 states have successfully launched ODR programs to assist in resolving disputes pending

in state courts. The commission recommends a pilot program related to small claims disputes in New York County involving the purchase and sale of goods and services where both parties are unrepresented. Under the ODR pilot program, cases that qualify for ODR will initially be directed to an online automated negotiation process. If the automated negotiation is unsuccessful, the parties will be directed to an unstructured negotiation space, where they can communicate directly toward a resolution. If this phase is unsuccessful, the

case will be assigned to a trained ODR mediator to assist the parties in seeking a resolution. If the parties come to a resolution, the ODR mediator creates a settlement agreement using standardized technology. The initial pilot project will be launched in New York County Small Claims Court, and the commission recommends that additional small claims pilot ODR programs be launched in courts having the greatest needs.

The pandemic has forced lawyers and our court system to reassess the manner in which the legal needs of New York-

ers are met. The substantial backlogs in our various courts have been further exacerbated by the pandemic. The commission's initial report benefits from the experience of providing remote access to our courts during the pandemic and uses that experience to chart a course for future efficiencies and greater access to justice for all New Yorkers.

David P. Miranda, Esq. is a partner in the Albany office of Heslin Rothenberg Farley & Mesiti, P.C. Mr. Miranda can be reached at (518) 452-5600 or David.Miranda@hrfmlaw.com.